Filed 8/25/04 In re Jazmine L. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re JAZMINE L., a Person Coming Under the Juvenile Court Law.	
VANESSA O., Plaintiff and Appellant, v. SUPERIOR COURT, Defendant and Respondent.	A106699 (Alameda County Super. Ct. No. J186201)

I.

INTRODUCTION

Petitioner Vanessa O. is the mother of Jazmine L., who is a dependent child of the juvenile court. Pursuant to California Rules of Court, rule 39.1B, she petitions for extraordinary writ review of orders terminating reunification services and setting a permanency planning and implementation hearing for the child pursuant to Welfare and Institutions Code section 366.26.[1] This hearing is currently scheduled for September 1,

[1] The Welfare and Institutions Code provides that a petition for extraordinary relief is generally the exclusive means by which an aggrieved party may challenge an order setting a permanent planning hearing. (Welf. & Inst. Code, § 366.26, subd. (b)(1).) These petitions for extraordinary relief are governed by procedures set forth in California Rules of Court, rule 39.1B. All statutory references are to the Welfare and Institutions Code. All rule references are to the California Rules of Court.

2004. Petitioner's sole contention is that the Alameda County Social Services Agency/Department of Children and Family Services (the Department) failed to give adequate notice of the dependency proceeding to the Indian tribes the minor might be affiliated with as required by the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). Having previously issued our order to show cause on June 21, 2004, we now deny the petition on the merits. (§ 366.26, subd. (*l*).) However, we must remand this case so that the juvenile court can ensure compliance with the applicable notice provisions of the ICWA.

II.

FACTS AND PROCEDURAL HISTORY

Petitioner does not challenge the sufficiency of the evidence supporting the orders taking jurisdiction of her minor daughter Jazmine, terminating reunification services, and setting a selection and implementation hearing (§ 366.26 hearing). Consequently, the facts supporting these orders will be briefly stated. Jazmine was detained on October 22, 2002, when she was less than one year old, and removed from petitioner's care. At the time, petitioner was 15 years old and there were concerns about her ability to parent Jazmine properly. Petitioner and Jazmine lived together in a group home for several months; however, petitioner AWOL'ed with Jazmine in February 2003. After being found, Jazmine was placed in the foster home where she currently resides. Jazmine is thriving in her foster home, and it is reported her foster parents wish to adopt her. Since Jazmine was placed with her foster family, petitioner has AWOL'ed from several other placements, missed many of her scheduled visits with Jazmine, and has been arrested for prostitution. On May 10, 2004, the juvenile court found that reasonable services had been provided, terminated petitioner's reunification services, and set a section 366.26 hearing.

We now set out the pertinent facts with respect to the sole issue on appeal—whether the ICWA notice requirements were fulfilled. The first mention of any possible Indian ancestry appears in the original detention report for this matter, dated October 25, 2002, indicating that the ICWA "does or may apply." Jazmine's maternal grandmother

and great-grandmother reported that Jazmine might be eligible for membership in the Cherokee, Choctaw, Choctaw/Ponca, or Blood Apache tribes. The jurisdiction/disposition report, dated November 8, 2002, indicated that all four of these tribes, as well as the Sacramento Bureau of Indian Affairs (BIA), had been notified of the proceedings in Jazmine's case. The BIA allegedly had responded that there was not enough information to establish Jazmine's Indian heritage with the Cherokee, Choctaw, or Choctaw/Ponca tribes, and that the Blood Apache tribe was unknown to the BIA. The report notes, "Further efforts may need to be clarified regarding the Blood Apache documentation."

The February 21, 2003 detention report noted that the Choctaw Nation had notified the Department that the Nation could not establish any Choctaw heritage for Jazmine. The record does not contain actual copies of the notice to the BIA or any of the named tribes, nor does the record contain copies of their responses.

In July 2003, Jazmine's maternal grandmother supplied the Department with new information regarding possible Choctaw heritage. The maternal grandmother provided the social worker with names and information on her great-grandparents, who were believed to be registered in the 1920 Choctaw census. The August 20, 2003 status review report indicates that on July 25, 2003, the Department sent out "SOC 318 Request for Verification of Indian Child Status" and a "SOC 319 Notice of Possible Indian Proceedings" to the Cherokee, Choctaw and Comanche Nations.[2] Proofs of service for

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[2] The State of California Health and Welfare Agency and the Department of Social Services have issued two forms for use in dependency proceedings involving children with Indian heritage. SOC 318, the Request for Confirmation of Child's Status as Indian, is used to determine whether the child is eligible for membership in an Indian tribe. SOC 319, the Notice of Involuntary Child Custody Proceeding Involving an Indian Child, gives the name, birth date, birthplace, and tribal affiliation of the child and the child's parents and is intended to alert the recipient to the dependency proceedings and to the tribe's right to intervene. California courts have held that the combination of the two forms calls for most, but not all, of the information the BIA Guidelines require the agencies to provide, if known. (See *In re C.D.* (2003) 110 Cal.App.4th 214, 225-226, and see 25 C.F.R. § 23.11(d) (2004).)

notice to the Comanche Nation, Choctaw Nation of Oklahoma and Cherokee Nation of Oklahoma for the August 20, 2003 status review hearing are present in the record. However, these proofs of service do not indicate what notice was actually sent, what information was included in the notice, nor do they reflect the Department provided the noticed Nations with a copy of the petition, an explanation of the matters before the court, or any information provided to the Department by Jazmine's maternal grandmother.

At a January 23, 2004 court proceeding, it was reported that the maternal grandmother had recently provided the Department with a family tree containing new genealogical information. Specifically, the maternal grandmother had a 25-page family tree and had given the Department the name of a relative, David Faulkner, an enrolled member of the Cherokee Nation. The court ordered the Department and the public defender, who represented Jazmine in these proceedings, to provide proper ICWA notice regarding future court dates.

On February 3, 2004, the Department sent notice to the Cherokee, Choctaw, and Comanche Nations reflecting this updated information. The Department sent the following to the Choctaw, Comanche, and Cherokee Nations: letters inquiring as to both petitioner and Jazmine's Indian status and copies of their birth certificates. The Department attached SOC 318 Request for Verification of Child's Status as Indian and a SOC 319 Notice of Involuntary Child Custody Proceeding Involving Indian Child to the Cherokee, Choctaw and Comanche Nations regarding both petitioner and Jazmine. All of these documents are photocopied and appear in the record provided to the court. Additionally, the Department provided to the court copies of certified mail receipts for each Nation.

At the February 18, 2004 court proceeding, none of the Nations notified had responded to the most recent notices that included the family tree information. The court found that the ICWA notice provisions would have to be complied with, but, to date, there was not enough indication Jazmine qualified as an "Indian child" to require compliance with ICWA in future hearings.

The Department's March 4, 2004 addendum report indicated that both the Comanche and Choctaw Nations had responded that Jazmine was not affiliated with their tribes. In a letter dated March 16, 2004, the Cherokee Nation responded to the public defender and said that Jazmine was not affiliated with the Cherokee Nation.

When Jazmine's maternal grandmother testified at the hearing the same day, Vanessa's counsel attempted to pursue a line of questioning designed to show that the Department had not followed through on information she had provided. However, the court deemed this line of questioning irrelevant because it had already ruled that the ICWA notice provisions continued to apply, but that it was unclear if Jazmine was an Indian child because some of the tribes had not yet responded. Petitioner's counsel inquired as to whether she would be allowed to attempt to show Jazmine and petitioner could have been qualified under the ICWA but that the Department failed to follow through. The court indicated such questioning was not relevant at this point in the proceedings.

At the May 10, 2004 hearing, the court indicated that continued compliance with ICWA notice provisions was appropriate, as the Cherokee Nation had not yet responded. The public defender then brought it to the court's attention that the Cherokee Nation had indeed responded to the public defender that Jazmine did not qualify for membership in that Nation. Petitioner's counsel pointed out that the record still did not contain documentation from the Ponca tribe or the BIA. The court implicitly found Jazmine was not affiliated with any tribe, that reasonable services had been provided, terminated petitioner's reunification services, and set the matter for a section 366.26 hearing.

Petitioner timely filed her writ petition. Pursuant to rule 39.1B(m), the Department and the public defender each submitted opposition briefs on July 1, 2004. Pursuant to rule 39.1B(o), we now determine the petition on its merits.

III.

DISCUSSION

Petitioner contends that the Department failed to give adequate notice of the dependency proceeding to the pertinent Indian tribes as required by ICWA, and failed to

make a sufficient inquiry into whether Jazmine was of Indian ancestry, i.e., an "Indian child" within the meaning of the ICWA.[3]

Congress enacted the ICWA in 1978 "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." (25 U.S.C. § 1902.) ICWA applies to child custody proceedings, including proceedings to terminate parental rights. (25 U.S.C. § 1903(1).)

The ICWA requires that notice be given to the appropriate Indian tribe in a child custody proceeding when the court knows, or has reason to know, the child is an "Indian child." (25 U.S.C. § 1912(a); see *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231.) Notice under the ICWA must be sent to the Indian child's tribe by registered mail with return receipt requested, providing notice of the pending proceedings and of the tribe's right of intervention. (25 U.S.C. § 1912(a); rule 1439(f); see *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) By federal regulation, such notice must include, *if known*, the following information: (1) the name, birthplace, and birth date of the Indian child; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) all known names and addresses of the Indian child's parents, grandparents, and certain other relatives and custodians, as well as their birth dates, places of birth and death, enrollment numbers, "and/or other identifying information"; and (4) a copy of the petition or other document by which the proceeding was initiated. (25 C.F.R. § 23.11(d) (2004).)

The ICWA's notice provisions are strictly construed with regard to the form of the notice and the evidence of notice that must be presented to the juvenile court. Several

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[3] An Indian child is a child who is "either (a) a member of an Indian tribe or (b) . . . eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe . . . ." (25 U.S.C. § 1903(4).)

cases have established a two-step process for proper ICWA notice. First, the social service agency, here the Department, must identify any possible tribal affiliation and send proper notice to those tribes, return receipt requested. Such notice is also required by rule 1439(f). Notice must be sent for every hearing until it is determined that the child is not an Indian child. (Rule 1439(f)(5).) Second, the social service agency must file with the juvenile court copies of the notices and the return receipts, as well as any correspondence from a tribe relevant to the child's status. (See *In re Asia L.* (2003) 107 Cal.App.4th 498, 507-509; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1214-1215; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 702-704; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739-740, fn. 4.)

Appellate courts describe these requirements as an essential component to the notice process, because they provide a way for a juvenile court to have a sufficient record to satisfy itself (1) that the notice requirements have been complied with, or (2) there is no need for further inquiry. (*In re Asia L.*, *supra*, 107 Cal.App.4th at pp. 508-509; *In re Jennifer A.*, *supra*, 103 Cal.App.4th at pp. 703-704; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1266.)

The notice requirements of the ICWA are mandatory and cannot be waived by the parties. (*In re Suzanna L.*, *supra*, 104 Cal.App.4th at pp. 231-232; *In re Samuel P.*, *supra*, 99 Cal.App.4th at p. 1267; *In re Jennifer A.*, *supra*, 103 Cal.App.4th at p. 707; *In re Marianna J.*, *supra*, 90 Cal.App.4th at p. 733.) Noncompliance with the notice requirement can invalidate the actions of the juvenile court, including an order terminating parental rights. (25 U.S.C. § 1914.)

Petitioner argues that the case must be remanded to the juvenile court to ensure strict compliance with the notice requirements of the ICWA. She complains that even though notice was given to various tribes at various points in time, it was statutorily inadequate in that some of the notices contained incomplete or incorrect information. She complains that the court erred in not allowing the maternal grandmother to present further ICWA evidence to the court. Furthermore, petitioner contends that because copies of the notices sent to the Ponca tribe and the BIA are not contained in the record, it

is unknown whether the contents of those forms were adequate to satisfy the requirements of the ICWA or whether the forms provide all of the information that had been obtained regarding Jazmine's possible Indian ancestry.

With respect to the Choctaw, Comanche, and Cherokee Nations, the Department concedes that the record compiled *at the outset* of these dependency proceedings does not show the ICWA notice requirements were satisfied because the Department failed to provide the court with any documentary evidence proving compliance. However, the Department contends any error was cured with the notices sent to these Nations in February 2004. As to that, the record contains documentary evidence that on February 3, 2004, the Department sent the following to the Choctaw, Comanche, and Cherokee Nations: letters inquiring as to both petitioner and Jazmine's Indian Status, forms SOC 318 and 319—which contained genealogical information—regarding both petitioner and Jazmine, copies of birth certificates for both petitioner and Jazmine, and notice of upcoming hearing dates. Additionally, the Department provided to the court copies of certified mail receipts for each of the Nations. The record also includes copies of letters sent from the Comanche Nation, the Choctaw Nation, and the Cherokee Nation stating that Jazmine was not affiliated with them. If the information sent in the February 2004 ICWA notices was correct and sufficient, any error with respect to the initial ICWA notices may be deemed harmless. (*In re C.D.*, *supra*, 110 Cal.App.4th at p. 224; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1117; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1412-1413.

However, as pointed out by petitioner and conceded by the Department, the record contains no proof that legally sufficient notices were sent to the Ponca tribe and the BIA, or that these entities were provided the information required by the ICWA. With respect to the Ponca tribe and the BIA, the Department's narrative report filed with the court simply declared that notice had been provided. But without the actual documents before it, the court could not satisfy itself, either from its own personal review or that of interested counsel for the parties, that proper notice was given. (*In re S.M.*, *supra*, 118 Cal.App.4th at p. 1118; *In re Asia L.*, *supra*, 107 Cal.App.4th at pp. 508-509; *In re*

Suzanna L., *supra*, 104 Cal.App.4th at p. 232; *In re Louis S*. (2004) 117 Cal.App.4th 622, 629.) Consequently, the matter will have to be remanded in order for the juvenile court to review these documents and assure itself that proper notice was given to the Ponca tribe and the BIA.[4]

Petitioner also argues that the information sent to the tribes was insufficient to allow the tribes to make an informed determination about Jazmine's status as an Indian child. In this regard, petitioner makes numerous specific claims: "There is no evidence the petition was ever attached to any alleged notice. None of the notices or proofs of service contained notice to a tribal chairperson. . . . The substantive information provided my [*sic*] the maternal grandmother and Mother's counsel regarding enrollment and rolls was never communicated to any tribe or the BIA."

On remand, the juvenile court may consider the sufficiency of the information given the respective tribes as one factor in determining whether proper notice was provided. To the extent the maternal grandmother might possess additional information about Jazmine's Indian ancestry, this new information is also required to be served on all pertinent tribes. As was recently observed in *In re Gerardo A*. (2004) 119 Cal.App.4th 988, "The opportunity for a tribe or the BIA to investigate [whether a child is eligible for tribal membership] means little if the department does not provide the available Indian heritage information it possesses." (*Id*. at p. 995; *In re Louis S*., *supra*, 117 Cal.App.4th at p. 631.)

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[4] The official addresses of all American Indian tribes are listed in the Federal Register. (64 Fed.Reg. 11490 (Mar. 9, 1999).) Under the ICWA, if a tribe's location cannot be determined, notice must be given to the BIA. (25 U.S.C. § 1912(a).) Under federal regulations, that notice must be sent to a specific BIA office, in this case the one in Sacramento. (25 C.F.R. § 23.11(b), (c)(12).) Although the BIA was allegedly given notice at the outset in the present case, further notice to the Sacramento office may be required where there remains some doubt about which specific tribe the child might belong to. (*In re C.D.*, *supra*, 110 Cal.App.4th at p. 227; *In re Edward H*. (2002) 100 Cal.App.4th 1, 6; *In re Louis S.*, *supra*, 117 Cal.App.4th at pp. 632-633.)

Having concluded that the Department failed to comply with the ICWA's notice requirements, we remain faced with the question of how this failure affects the proceeding, which is the subject of this writ. Because the orders made by the juvenile court setting this matter for a permanency planning and implementation hearing under section 366.26 were indisputably supported by the law and the evidence, and because there has been no determination at this juncture that the ICWA even applies to this proceeding, we see no reason to grant the writ. We instead adopt the same approach taken by other appellate courts that have addressed a lower court's failure to provide adequate notice under 25 U.S.C. § 1912(a), and remand so that the Department may present evidence of the notices that were sent to the BIA and all interested tribes. (See, e.g., *In re H. A.*, *supra*, 103 Cal.App.4th at p. 1215; *In re Suzanna L., supra*, 104 Cal.App.4th at p. 237; *In re Samuel P.*, *supra*, 99 Cal.App.4th at p. 1268; *In re S.M.*, *supra*, 118 Cal.App.4th at p. 1119; *In re Louis S.*, *supra*, 117 Cal.App.4th at p. 634.)

If petitioner has any evidence or arguments with respect to compliance with ICWA notice requirements, the court may review the evidence and arguments presented and make a determination as to whether ICWA notice requirements have been satisfied. If the court determines legally sufficient notice was provided, it is directed to reinstate all prior orders. If the court determines that proper ICWA notice was not given, the court shall order the Department to comply with the notice requirements of ICWA. In the end, if the notified tribes do not seek to intervene, the original orders will stand. If it is determined that Jazmine is an Indian child entitled to the protection of the ICWA, further proceedings consistent with the ICWA will be necessary.

In closing, we recognize that timeliness is of vital importance in juvenile dependency matters because delay usually does not serve a child's interests. (See *In re Emily L.* (1989) 212 Cal.App.3d 734, 743.) However, we cannot disregard the potential adverse impact from the deficient notice provided in this case given the fact that noncompliance with the notice requirement can invalidate the actions of the juvenile court, including an order terminating parental rights. (25 U.S.C. § 1914 [tribe may petition to invalidate action on showing of violation of notice requirements]; *In re*

Desiree F. (2000) 83 Cal.App.4th 460, 475 [trial court orders invalidated at the request of the tribe because notice had not been given in compliance with ICWA]; rule 1439(n)(2) [final decree of adoption may be set aside for noncompliance with ICWA].) Consequently, we agree with those courts that have emphasized the importance of strict compliance with ICWA notice requirements and, if necessary, have remanded the matter for the juvenile court to ensure that proper notice is given. (*In re H. A.*, *supra*, 103 Cal.App.4th at p. 1214; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 855-856; *In re Karla C.* (2003) 113 Cal.App.4th 166, 178-179.)

IV.

DISPOSITION

The petition for extraordinary relief is denied on the merits consistent with the views expressed in this opinion. (See Cal. Const., art. VI, § 14; *Kowis* v. *Howard* (1992) 3 Cal.4th 888.) The juvenile court is directed to vacate the order referring the matter for a section 366.26 hearing and to hold a special hearing in order to review whether proper notice was provided under the ICWA. This opinion is final as to this court immediately. (Rule 24(b)(3).)

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Ruvolo, J.

We concur:

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Kline, P.J.

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Haerle, J.